Supreme Court, U.S.
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No. 90-1225

IN THE

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; BARBARA BURKE, Trustee for PAUL WILSON Estate;
Petitioners,

(Additional Petitioners are listed inside front cover.)

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,
Respondents,

and

SHELL WESTERN E & P, Inc.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners,

TABLE OF CONTENTS.

		Page
I.	Introduction	1
II.	Question One	2
III.	Question Two	7

TABLE OF AUTHORITIES.

Andrus v. Shell Oil Co., 446 U.S. 657 (1980) 5

Chevron U.S.A., Inc. v. Natural Resources Council, Inc., 467 U.S. 837 (1984) 3,4,5,6

SEC v. Chenery Corp., 332 U.S. 194 (1947) 5

STATUTES.

Mineral Leasing Act of 1920, ch. 85, 41 Stat. 43 (Codified as amended at 30 U.S.C. §§181-287 (1988)) 5

30 U.S.C. §121 1

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REPLY BRIEF FOR PETITIONERS

I. Introduction

In our petition, we demonstrated that this case presents two significant questions, each of which is independently worthy of review. First, we demonstrated that in construing land patents which incorporate language from the Agricultural Entry Act of 1914, the Court of Appeals improperly gave deference to an Interior Department interpretation of the 1914 Act made decades after the land patents were executed. We showed that a reasonable agency interpretation of the 1914 Act can bear on the meaning of documents which incorporated the statute's language *after* that interpretation was promulgated, but that it cannot sensibly affect the meaning of land patents or other documents that were fully executed long *before* the agency's interpretation was announced.

Second, even assuming that deference to the Interior Department was appropriate, we pointed out two distinct and serious defects in the agency's conclusion that "oil and gas" reservations in petitioners' land patents give the United States ownership of carbon dioxide deposits located beneath petitioners' lands. First, the 1914 Act authorizes reservations to the United States only of those minerals "on account of which the lands were withdrawn [from homesteading]. . . ." 30 U.S.C. §121 (1988). In view of the agency's own finding that there is "no evidence that the land involved herein was withdrawn . . . on account of carbon dioxide," Pet. App. 53a n.6, we are still wondering how we could possibly have lost this case. Second, we argued that the term "gas," as it is used in the 1914 Act and petitioners' patents, refers only to natural gas, not to nonfuel gases like CO2.

Finally, and perhaps most importantly, we demonstrated that both questions are of enormous significance. The first question has obvious relevance for

any circumstance in which statutory or regulatory language is incorporated into a separate legal instrument. The second question substantially affects the administration of the nearly 5.5 million acres of land subject to federal "oil and gas" reservations. This case alone involves more than 15,000 acres of land and approximately $500,000,000.00 worth of deposits.

II. Question One

As they have done throughout this proceeding, the government and intervenors adopt a strategy of misdirection. This is particularly evident with respect to our arguments concerning Question 1 of our petition,[1] to which neither the government nor the intervenors offer a direct response. Instead, they seek to recast the question in a form more to their liking, and as a result spend much of their energy fencing with shadows.[2]

Our point here is a simple one, notwithstanding the respondents' determined efforts to obscure it. A land patent is executed (let us say in 1922), containing a reservation to the United States of all "oil and gas" located beneath the land. The "oil and gas" reservation is included pursuant to the terms of the Agricultural Entry Act of 1914, and both the landowner and the

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[1] "When determining the meaning of legal documents which incorporate preexisting statutory language, may courts properly defer to agency interpretations of the underlying statute that are made *after* the documents are executed?" Pet. i.

[2] Unfortunately, this tactic served the respondents well in the lower courts. Their dogged refusal to address our argument that post-patent interpretations are not entitled to deference no doubt helped induce the Court of Appeals to conflate this argument with the very different claim (which we also advanced below but do not press in this petition) that the agency's 1986 interpretation was inconsistent with its prior interpretations of "gas" in other contexts, and was therefore not entitled to deference in fact even if it could be entitled to deference in principle. *See* Pet. App. 24a.

government agree that the terms "oil" and "gas" have the same meaning in the patent as in the statute. At the time the patent is executed, the agency charged with administering the 1914 Act has not offered an interpretation of the statute that is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Some time after the patent is executed, however, the agency offers an interpretation of the term "gas" in the 1914 Act that satisfies all of the criteria for *Chevron* deference, including (we will assume for the moment) substantive reasonableness. Does that agency interpretation have any proper bearing on the meaning of the fully executed patent?

The answer, we submit, is obviously no. When the patent was executed, it vested title to particular minerals beneath the patented land in either the patentholder or the government, depending upon the proper interpretation of the patent reservation and the 1914 Act. In either case, that title was *definitively vested in 1922*; at that point in time, the reservation took on the meaning of the statute as it then stood. If in 1921 the agency had provided a *Chevron*-quality interpretation of the 1914 Act, then at the moment at which title to the minerals vested, the statute, and hence the patent reservation, would have meant what the agency at that time reasonably interpreted it to mean. But in the absence of a definitive agency interpretation in 1922 (or whenever else the patent was executed), the reservation took on, not some later-to-be-determined permissible meaning of the statute, but the *best* meaning of the statute—just as any court construing a statute in the absence of a *Chevron*-quality agency interpretation must search for the statute's best meaning. If the agency later (for example, in 1923) promulgates a binding administrative interpretation, that interpretation prospectively affects the meaning of the statute, but it

cannot alter the meaning of the fully executed land patent which incorporates the statute. That meaning—whatever it may be—was fixed at the moment of execution. Since in the case at bar the Interior Department did not interpret the word "gas" in the 1914 Act until many years after the last of petitioners' patents were executed,[3] the meaning of petitioners' patent reservations should have been determined without giving deference to that interpretation.

The argument is unanswerable, which no doubt explains why respondents do not answer it. The only response by the government that rises to the level of an argument is its claim that our analysis "is premised on [the] . . . assertion that, unlike courts, agencies are always 'free to reinterpret the statute in other permissible ways at later times,' " Brief for the United States in Opposition at 11, which assertion the government argues is neither true nor implicated by the facts of this case. *See id.* at 10-12.[4] This badly misses the mark. Obviously, our argument is not "premised" on any such proposition. As set forth above and in our petition, *see* Pet. 7-8, 10-11, our analysis is "premised" on elementary, bedrock principles of administrative law. We introduced the spectre of a flip-flopping agency only to illustrate one of the many absurd consequences that flow from the Court of Appeals' erroneous approach to

[3] The Interior Board of Land Appeals announced its interpretation of the statute in 1986. The Regional Solicitor for the Department of the Interior offered the same interpretation in 1979. We believe that only the former interpretation is sufficiently the product of "the agency" to be entitled to *Chevron* deference, but since the last of petitioners' patents were executed in 1962, nothing whatsoever turns on this point.

[4] The remainder of this portion of the government's response points out that we are asking this Court to enunciate our proposed deference rule for the first time, and that nothing we say affects the power of courts to construe land patents. *See* Brief for the United States in Opposition at 10. We happily accede to both propositions.

administrative review. We emphatically stand by our spectre,[5] but it is incidental to our *substantive* argument, which the government has simply refused to address.

The intervenors are even further off line. As best as we can discern, their argument on this score is twofold: they contend (1) that our analysis wrongly assumes that the Interior Department's interpretation of the 1914 Act constituted a change of position, *see* Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 11-12, and (2) that the Interior Department's 1986 interpretation of the 1914 Act was foreshadowed by prior interpretations of the term "gas" in related legislation, such as the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)), and cannot be viewed in a vacuum, *see* Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 8-10.

The first argument, as noted above, seriously misstates our position before this Court. We make no claims in our petition about the Interior Department's pre-1986 view of the 1914 Act, and indeed we expressly endorse and rely upon the Court of Appeals' conclusion

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[5] It is surely true that effect on settled expectations would be a factor to consider in assessing the reasonableness under *Chevron* of an agency's (re)interpretation of a statute. Under established principles of administrative law, however, such reinterpretation would be permitted if "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles," *SEC v. Chenery Corp.*, 332 U.S. 194; 203 (1947), outweighs "the ill effect of the retroactive application of a new standard." *Ibid.* If a different rule exists for administrative interpretations affecting mineral rights, it was certainly not announced in *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980), *see* Brief for the United States in Opposition at 11, which reversed an agency reinterpretation of a statute because the original interpretation was *correct*, not because the reinterpretation affected settled expectations. *See* 446 U.S. at 673 ("We conclude that the original position of the Department of the Interior . . . is the correct view of the Mineral Leasing Act as it applies to the patentability of these claims").

that "[u]ntil the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is 'gas' within the meaning of the 1914 Act." Pet. App. 23a-24a. It is irrelevant to this argument whether the agency's post-patent interpretation was or was not a revision of a prior interpretation; all that matters is whether the interpretation under review was announced before or after the patents were executed. If the latter, then no deference is appropriate—period.

Their second argument misses the point even more badly. The existence *vel non* of prior agency interpretations of "gas" in related legislation is relevant to determining whether the Interior Department's 1986 interpretation of the 1914 Act was *reasonable*—that is, it is relevant to determining the proper amount of deference on the assumption that some measure of deference is appropriate. It has no relevance whatsoever to determining whether deference is appropriate in the first instance. It is elementary that for an agency interpretation to be entitled to *Chevron* deference, it must be an interpretation of the particular statute under review.[6] The conclusion that there was no such interpretation of the 1914 Act extant prior to 1986 (and therefore no such interpretation extant when petitioners' patents were executed) is therefore dispositive of the question whether deference should have been granted in this case.

In sum, our demonstration that the Court of Appeals has announced and applied a new, erroneous, and potentially disastrous principle of administrative review has gone essentially unchallenged—as it did in the lower courts. Review is clearly warranted.

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[6] Indeed, this proposition is so elementary that we cannot find a case that has had occasion explicitly to announce it.

III. Question Two

Review is also warranted on Question 2.[7] Crucially, the respondents do not deny that this question is of enormous importance to the administration of the public lands. That is itself sufficient reason for this Court to grant certiorari and provide a definitive resolution.

In response to our argument that the plain meaning of the 1914 Act establishes that "oil and gas" reservations do not include CO2, the respondents simply repeat the analysis offered by the Court of Appeals, which we addressed at some length in our petition. *See* Brief for the United States in Opposition at 12-15; Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 16-18, 20-22. Because we are seeking plenary review rather than summary reversal, we see nothing in these arguments that warrants an additional response.

The respondents' answer to our claim that CO2 could not in any event have been reserved in petitioners' patents because it was not a mineral "on account of which the lands were withdrawn," 30 U.S.C. §121 (1988), is equally feeble. The government's response is contained entirely in one baldly asserted sentence: "The absence of evidence [that petitioners' lands were withdrawn on account of CO2 deposits] does not, as petitioners would have it (Pet. 15), compel acceptance of their claim that the type of gas [reserved in the patents] was exclusively 'fuel gas.' " Brief for the United States in Opposition at 16. Oh yes it does.

Under the terms of the 1914 Act, the proper scope of a mineral reservation is strictly determined by the scope of the prior withdrawal from homesteading. If land was

[7] "Do land patents which reserve 'oil and gas' interests to the United States pursuant to the Agricultural Entry Act of 1914 also reserve to the government deposits of carbon dioxide found beneath the patented land?" Pet. i.

withdrawn from homesteading exclusively "on account of" potash deposits, then an "oil and gas" reservation on that land is unlawful. Similarly, if the sole ground for withdrawal was petroleum deposits, then a reservation of "gas" is similarly unlawful, *unless the "gas" reservation refers only to fuel gases that typically accompany oil deposits. See* Pet. 16 n.9. The agency in this case explicitly found that in this record that there is "no evidence," Pet. App. 53a n.6, that petitioners' lands were withdrawn on account of CO2. Respondents thus face the following dilemma: either they can accept (more graciously than they have thus far) our concession that petroleum, and hence fuel gas, was a proper subject of reservation, or they can maintain that even the reservation of fuel gas was unlawful. But they cannot parlay the absence of evidence of CO2 withdrawals into an expansion of the permissible scope of the reservation. The "on account of which" language in the 1914 Act is a *limitation* on the government's power of reservation, not an authorization.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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